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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 439

UNITED STATES OF AMERICA, PETITIONER

v.

ANTHONY GRACE & SONS, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Court of Claims (R. 66–91) is reported at 345 F. 2d 808. The opinion of the commissioner of the Court of Claims (R. 48–65) is unreported.

JURISDICTION

The opinion and order of the Court of Claims were entered on May 14, 1965. The petition for a writ of certiorari was filed on August 9, 1965, and granted on November 8, 1965 (R. 92). The jurisdiction of this Court rests upon 28 U.S.C. 1255(1).[1]

[1] Although the decision of the Court of Claims does not finally grant or deny relief, this Court has jurisdiction to review the decision under 28 U.S.C. 1255(1), which extends cer-

QUESTION PRESENTED

Whether a reviewing court which rules that factual disputes should have been resolved administratively pursuant to a standard government disputes clause may nonetheless require that they be resolved in a judicial trial rather than administratively.

STATUTORY AND CONTRACT PROVISIONS INVOLVED

1. The Act of May 11, 1954, 68 Stat. 81 (the Wunderlich Act, 41 U.S.C. 321–322), provides:

> That no provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: *Provided, however,* That any such decision shall be final and conclusive unless the same is fradulent [*sic*] or capricious or arbitrary or so grossly

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tiorari jurisdiction to "[c]ases in the Court of Claims." Pursuant to this provision and its predecessor, which conferred jurisdiction over "judgments and decrees of the Court of Claims," this Court has held that it would review interlocutory orders of the Court of Claims. *United States* v. *Caltex, Inc.*, 344 U.S. 149; *United States* v. *Central Eureka Mining Co.*, 357 U.S. 155; see *Marconi Wireless Co.* v. *United States*, 320 U.S. 1. The decision of the Court of Claims in this case finally determines the right in issue—*i.e.*, the right to have the factual matters here involved determined administratively pursuant to the disputes clause rather than judicially. See *Cohen* v. *Beneficial Industrial Loan Co.*, 337 U.S. 541; *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148.

erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.

SEC. 2. No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board.

2. Paragraph 2 of the letter of acceptability (R. 16) provided in relevant part:

> 2. Failure to perform all obligations prior to the time prescribed for closing will be just cause for cancelling all commitments undertaken with you in connection with the housing project and for the recovery under your bid security of liquidated damages in the sum of $25,000, together with actual damages to the Department, such actual damages to be itemized and determined by the Contracting Officer, whose decision will be reduced to writing and furnished to you by mail or otherwise. Such decision shall be final and conclusive unless, within 30 days from the receipt thereof, you appeal in writing to the head of the Department or his duly authorized representative, and his decision shall, unless determined by a court of competent jurisdiction to have been fraudulent or capricious or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence, be final and conclusive. In connection with any appeal under this paragraph you will be afforded an opportunity to be heard and to offer evidence in support of your appeal.

STATEMENT

In August, 1958, the Department of the Air Force issued an invitation for bids for the construction of

177 military housing units at Topsham Air Force Station, Maine (R. 73). The invitation form advised that the lowest acceptable bidder would be issued a Letter of Acceptability in a form attached to the invitation, and provided that "upon issuance of such Letter of Acceptability" the bidder "becomes obligated to carry out its terms within the times therein stated" (R. 47, 75). The bid form also advised of the requirements of the Davis-Bacon Act and the National Housing Act that "wages paid to laborers and mechanics be the prevailing wage as determined by the Secretary of Labor not more than ninety (90) days prior to the commencement of construction" and explained that differences between the tentative minimum wage schedule attached to the invitation and the minimum wage schedule finally determined by the Secretary of Labor might require an adjustment of the bid price in an amount to be determined by the Federal Housing Commissioner (R. 73–74).

The bid invitation required each bidder to submit a deposit of $25,000 with its bid (R. 74). The form letter of acceptability obligated the successful bidder to be ready for a closing within a specified time after opening of the bids (R. 17, 74–75, 75–76) and provided that failure to timely perform all obligations would constitute "just cause for cancelling all commitments" and "for the recovery under your bid security of liquidated damages in the sum of $25,000," plus actual damages (R. 16). Finally, the form letter of acceptability provided for the administrative determination of any such failure to perform and of liqui-

dated and actual damages, subject to judicial review for arbitrariness and substantial evidence (R. 16; see *supra*, p. 3).

Respondent Anthony Grace & Sons, Inc., submitted the lowest acceptable bid of $2,866,093, together with a deposit of $25,000, and was issued a Letter of Acceptability in October, 1958 (R. 79). Grace then requested the Secretary of Labor to make an appropriate wage determination (R. 80). The Secretary made two determinations, one concerning the wage rates to be paid for general construction of the houses, the other for heavy and highway construction (R. 80). As in the tentative wage schedule attached to the invitation for bids, the rates for heavy and highway construction were lower than those for building construction (R. 80). After receiving the Secretary's determinations, Grace took the position that they required it to pay the higher building construction rates for a greater area than provided in the specifications, which in Grace's view confined the higher building construction rate to work within a perimeter 5 feet outside the building foundation line (R. 81). Grace requested the Federal Housing Commissioner to increase the bid price accordingly (R. 81). The Commissioner rejected Grace's position on this issue and denied the requested increase (R. 81).

Grace thereupon requested the Air Force to increase the bid price by $85,834, in accordance with Grace's interpretation of the documents (R. 81). The Air Force denied this request (R. 81). In a letter of July 2, 1959, Grace expressed its disagreement with this decision and stated that it was not in a position

to carry out the contract until the matter was resolved (R. 82). By letter of October 1, 1959, the Air Force representative advised the contractor that "pursuant to paragraph 2 of the letter of acceptability" (p. 3 *supra*), the Air Force "hereby cancels all commitments undertaken with you in connection with the housing project, reserving all its rights with respect to the recovery of damages" (R. 82). By letter of October 7, 1959, Grace, through its counsel, asserted that the Air Force was responsible for the difficulties, requested return of the bid deposit, and reserved its rights with respect to recovery of damages (R. 40-41). The request for return of the deposit was denied in a letter dated October 19, and Grace was advised that the project would be opened to new bids (R. 42). The letter of October 19 did not reach the contractor's counsel (R. 82–83). He inquired on December 4 and was furnished a copy of that letter on December 9 (R. 83). He then filed on behalf of Grace a "notice of appeal" from "the decision [of] October 1" by letter of December 16, in which he took the position that his letter of October 7 constituted an appeal from that decision of October 1 (R. 44–45).

The Armed Services Board of Contract Appeals granted the government's motion to dismiss the appeal as untimely. Noting that Grace's notice of appeal had explicitly characterized the letter of October 1 as the appealable decision, the Board ruled that the letter of October 1 did constitute the appealable decision, and that the letter of October 7 disclosed no present intention to invoke the right of appeal. Since the letter of acceptability gave respondent 30 days

within which to appeal from a decision to cancel, the Board concluded that the notice of appeal of December 16 was untimely (R. 25–38).

The contractor thereafter brought this action in the Court of Claims, claiming $450,000 in damages for breach of contract (R. 1–12). Grace's position was that the wage determinations of the Secretary of Labor constituted a breach of contract because they unilaterally altered the provisions of the specifications defining the scope of the work to be performed by the higher-paid building construction personnel (R. 9, 11, 64). The government moved for summary judgment on the basis of the administrative decision and record.

The Commissioner of the Court of Claims recommended that the government's motion be denied (R. 48–65). He ruled that the Air Force letter of October 1 was not a final decision because it did not state whether the bid deposit would be returned and did not indicate the amount, if any, of actual damages to the government (R. 62–63). Since the letter of October 19—which was a final decision—was not received by respondent until December 8, the commissioner held that the notice of appeal filed on December 16 was timely (R. 63). The commissioner also held that there were factual issues remaining to be tried in the case, but that the decision of this Court in *United States* v. *Carlo Bianchi & Co.*, 373 U.S. 709, requiring that factual issues in contract disputes be determined under the disputes clause, was inapplicable because respondent's claim "involves an alleged breach of con-

tract" and hence was not covered by the disputes clause (R. 64).[2]

The Court of Claims unanimously agreed that the administrative appeal was timely, for the reasons advanced by its Commissioner (R. 73–87). There was, however, disagreement in the court on the question of whether the case should be returned to the administrative board for a hearing or retained for a judicial trial. The majority held that the case should be retained for a judicial trial (R. 68–73). It pointed out that, under its prior decisions, "failure of the contracting officer to perform his adjudicatory functions" entitled the contractor to "immediate recourse to the courts" (R. 70–71). The majority concluded that a stay of judicial proceedings to permit administrative findings is warranted only "where the suspension will actually expedite handling of the litigation or where the Supreme Court has indicated that a stay of court proceedings is justified" (R. 72). It did not believe that this Court's decision in *United States* v. *Carlo Bianchi & Co.*, 373 U.S. 709, was applicable, since that case did not involve "a situation where a contract appeals board has refused jurisdiction" (R. 72). Indeed, the majority thought that the policy against delay in government contract litigation, stressed in *Bianchi*, required a judicial rather than an adminis-

[2] This Court now has before it, in *United States* v. *Utah Construction and Mining Co.*, No. 440, the question of the validity of the Court of Claims' rule that "breach of contract claims" are not required to be submitted to administrative determination under the disputes clause.

trative trial of the factual issues in this case (R. 72–73).[3]

Judges Davis and Laramore dissented on the ground that judicial proceedings should be stayed so that the factual issues could be resolved administratively (R. 88–91). They observed that in *United States* v. *Carlo Bianchi & Co.*, 373 U.S. 709, 717–18, this Court had ruled that where an administrative board had committed some prejudicial error, but the record did not compel a judgment for the contractor, the Court of Claims should stay its proceedings pending administrative resolution of factual issues covered by the disputes clause (R. 88). Although adhering to prior decisions of the Court of Claims holding a judicial trial permissible on damage issues which the administrative board failed to reach because of an erroneous decision against the contractor on the merits, the dissenters concluded that a judicial trial was not warranted in the present case, where issues of liability as well as damages remained to be resolved (R. 89–91).

SUMMARY OF ARGUMENT

In *United States* v. *Carlo Bianchi & Co.*, 373 U.S. 709, this Court ruled that the function of the courts under the Wunderlich Act, in cases involving administrative decisions under the standard government disputes clause, was simply to review those decisions, and that the Court of Claims should not receive evi-

[3] The majority opinion below makes the tacit assumption that the dispute here involved is covered by the disputes clause, thus disagreeing with the commissioner's conclusion that *Bianchi* is inapplicable because a "breach of contract" claim is involved. See note 2 *supra*.

dence *de novo*, but must review solely on the basis of the administrative record. This Court further ruled that the lack of power in the Court of Claims to remand did not preclude review on the basis of the administrative record where the record reveals the commission of "prejudicial error" by the administrative board. For, in this situation, the Court ruled, the Court of Claims should stay its own proceedings pending further administrative action.

In the present case, the Court of Claims ruled that the administrative board should have resolved the factual disputes pursuant to a disputes clause, instead of dismissing the administrative appeal as untimely. Under the ruling of this Court in *Bianchi*, therefore, the Court of Claims should have stayed its own proceedings pending administrative consideration and resolution of the merits of the case. By retaining the case for a judicial trial, the Court of Claims violated the Wunderlich Act and the disputes clause, which commit factual disputes to administrative determination, subject only to judicial review. Contrary to the assumption indulged by the Court of Claims, the submission of these issues to the administrative board will in all probability expedite rather than delay the final decision. It may be assumed that the administrative board, having been told by the Court of Claims that it should consider and decide the factual disputes, will promptly do so.

ARGUMENT

1. In *United States* v. *Carlo Bianchi & Co.*, 373 U.S. 709, this Court ruled improper the pre-existing prac-

tice of the Court of Claims of receiving evidence *de novo* on factual issues committed to administrative determination by the standard disputes clause in government contracts. For such disputes, this Court held, judicial proceedings under the Wunderlich Act, 41 U.S.C. 321–322, were to be limited to a review of the administrative findings and record. 373 U.S. at 714. In response to the contention of the contractor in that case that the Court of Claims had no authority to remand a case, and "thus if the administrative record is defective or inadequate, or reveals the commission of some prejudicial error, the court can only hold an evidentiary hearing," the Court replied (373 U.S. at 717–18):

> There are, we believe, two answers to this contention. *First,* there would undoubtedly be situations in which the court would be warranted, on the basis of the administrative record, in granting judgment for the contractor without the need for further administrative action. *Second,* in situations where the court believed that the existing record did not warrant such a course, but that the departmental determination could not be sustained under the standards laid down by Congress, we see no reason why the court could not stay its own proceedings pending some further action before the agency involved. * * * And in any case in which the department failed to remedy the particular substantive or procedural defect or inadequacy, the sanction of judgment for the contractor would always be available to the court.

The isuue presented here is precisely covered by the quoted portions of this Court's ruling in *Bianchi*. For the erroneous dismissal of an administrative appeal as untimely is certainly a "prejudicial error", as is any failure by the administrative agency to hear and determine issues of liability or damages which it should have reached. In the present case, there is no administrative record on the basis of which judgment for the contractor can be given. Accordingly, under this Court's ruling in *Bianchi,* the only proper course is to suspend judicial proceedings for a reasonable period to permit administrative determination of the factual issues involved in the case.

Bianchi confirmed what the disputes clause and the Wunderlich Act provide—namely, that the administrative boards are charged with receiving evidence and resolving factual disputes arising under the contract, and that the function of the courts is simply to review the administrative determination. As Judge Davis noted in his dissenting opinion below, this Court in *Bianchi* recognized that "the boards, not the courts, are to be the fact-finders" on issues committed to their determination by the contract (R. 88). To require a judicial trial in lieu of administrative determination is to rewrite the agreement of the parties. The basic thrust of the Wunderlich Act is to require judicial review of administrative decisions under the disputes clause to follow the usual pattern for judicial review of administrative decisions. As this Court noted in *Bianchi,* 373 U.S. at 714–15, the Act is cast in language typically used by Congress in providing for judicial review of administrative action. Usually,

when an agency fails to determine particular issues within the administrative sphere, the reviewing court may not determine these issues itself, but must remand to the agency for further proceedings or, where a remand procedure is not available, stay judicial proceedings pending further administrative action.[4] So it is here.

The Court of Claims justifies its unique practice on the ground that its review of decisions under the disputes clause is not analogous to the usual judicial review of administrative decision. Its approach is articulated in the earlier case of *Stein Bros. Mfg. Co.* v. *United States*, 337 F. 2d 861, 864:

> [T]he Wunderlich Act—unlike the normal statute vesting power in an administrative agency—does not grant the administrative bodies exclusive jurisdiction over the entire subject of the contract; the Act merely makes the administrative findings conclusive (in the absence of arbitrary action, etc.) on those particular matters of fact dealt with by the administrators, without depriving this court of its general jurisdiction under the Tucker Act. * * *

The court also argues that Wunderlich Act review differs from normal judicial review in another way (*ibid.*):

> Unlike the Courts of Appeals when reviewing administrative decisions, this court and the district courts are well equipped to take and

[4] *F.P.C.* v. *Idaho Power Co.*, 344 U.S. 17; *Securities Exchange Commission* v. *Chenery*, 318 U.S. 80; *Pennsylvania R. Co.* v. *United States*, 363 U.S. 202; *Lavino Shipping Co.* v. *Donovan*, 267 F. 2d 59 (C.A. 3); *Leonard* v. *NLRB*, 197 F. 2d 435 (C.A. 9).

consider evidence on damage questions not decided by the administrative agencies because they ruled against the contractor on the merits of his claim.[5] * * *

These arguments overlook the fact that the disputes clause constitutes an agreement of the parties making the administrative board the arbiter of factual disputes,[6] subject only to the judicial review for arbitrariness and substantial evidences prescribed by the Wunderlich Act. Neither the Court of Claims, nor any district court, can consider these disputes unless the contractor has first exhausted its administrative remedies[7]; and the administrative findings of fact are conclusive, subject only to standards of review typically employed by Congress in providing for judicial review of administrative decisions.[8] In short, in disputes clause cases the Court of Claims, like the district

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[5] In *Stein*, the Court of Claims, after holding that the administrative board erred in concluding that the government was not liable to the contractor, refused to suspend proceedings for an administrative determination of damages, but held that it would retain jurisdiction and determine damages itself. *Stein* was decided after this Court's decision in *Bianchi*.

[6] E.g., *Kihlberg* v. *United States* 97 U.S. 398, 401; *Ripley* v. *United States*, 223 U.S. 695, 702, 704; *United States* v. *Wunderlich*, 342 U.S. 98.

[7] *United States* v. *Blair*, 321 U.S. 730; *United States* v. *Callahan Walker Construction Co.*, 317 U.S. 56.

[8] See *United States* v. *Carlo Bianchi & Co.*, 373 U.S. 709, 715: "Moreover the standards of review adopted in the Wunderlich Act—'arbitrary,' 'capricious,' and 'not supported by substantial evidence'—have frequently been used by Congress and have consistently been associated with a review limited to the administrative record. [citing the Administrative Procedure Act, the Fair Labor Standards Act, and the National Labor Relations Act]."

courts, is in every respect a reviewing court, and should act like one. The fact that they are also courts of original jurisdiction is irrelevant. For, as this Court observed in *Bianchi*, "the function of reviewing an administrative decision can be and frequently is performed by a court of original jurisdiction as well as by an appellate tribunal." *United States* v. *Carlo Bianchi & Co.*, 373 U.S. 709, 715.[9]

The administrative proceedings under the disputes clause do differ from the typical administrative proceedings, in that they are required by the contractual agreement of the parties, expressed in the disputes clause, rather than by statutory mandate. In this respect, the situation is analogous to arbitration. But that does not change the result: when an arbitrator fails to decide an issue which he should have decided, the proper course for the reviewing court is to provide for the submission of the issues to the arbitrator. *Steelworkers* v. *Enterprise Corp.*, 363 U.S. 593, affirming on this point 269 F. 2d 327, 331–332 (C.A. 4); *International Ass'n of Machinists* v. *Crown Cork & Seal Co.*, 300 F. 2d 127 (C.A. 3). See, 9 U.S.C. 3, 4.

2. The majority below attempted to distinguish *Bianchi* on the ground that it did not involve "a situation where a contract appeals board has refused jurisdiction" over a dispute (R. 72). The majority believed that *Bianchi* did not call for suspension of judicial proceedings "where an appeals board has re-

[9] See, *e.g.*, 5 U.S.C. 1009 (Administrative Procedure Act); 28 U.S.C. 2321 *et seq.* (district court review of Interstate Commerce Commission); 42 U.S.C. 405(g) (district court review of administrative decision under Social Security Act).

fused jurisdiction in a case, or where its prior decisions demonstrate that it will not entertain jurisdiction" (R. 72). But the *Bianchi* decision contained no "refusal of jurisdiction" exception, and there is no reason for creating one. For if a court of competent jurisdiction rules that an administrative agency can and should resolve an issue, it is unrealistic to suppose that the agency will not do so. At any rate, this Court's decision in *Bianchi* expressly covers that contingency (373 U.S. at 718):

> * * * And in any case in which the department failed to remedy the particular substantive or procedural defect or inadequacy, the sanction of judgment for the contractor would always be available to the court.

In the present case, the Court of Claims has afforded the administrative board no opportunity to correct its error in dismissing the administrative appeal and to resolve the factual issues which the disputes clause committed to it for resolution. It is not as though the board had "refused jurisdiction" because it believed itself wholly without power to resolve the contested issues of fact. The board merely dismissed as untimely an administrative appeal which the Court of Claims believed timely. The board's action was, at most, a procedural error—not a denial of jurisdiction over the subject matter. Nor does the Court of Claims premise its ruling on any different view of the board's action. Indeed, when an administrative board rules against the contractor on the merits of

his claim for an equitable adjustment of the contract price and for that reason makes no findings as to the amount of the adjustment, the Court of Claims makes its own findings as to the amount rather than return the case to the agency, for determination of that amount, on theory that the boards have "declined jurisdiction."[10] *E. H. Sales, Inc.* v. *United States,* 340 F. 2d 358; *Jack Stone Company* v. *United States,* 344 F. 2d 370; *H. R. Henderson & Co.* v. *United* States (Ct. Cl. No. 319–60, January 22, 1965, slip op. pp. 6, 21–22); *Stein Bros. Mfg. Co.* v. *United States,* 337 F. 2d 861. Yet the conduct of the boards in those cases, like that of the board here, indicated clearly that they were accepting, not declining, jurisdiction and that at worst they erred in exercising the jurisdiction committed to them. In all such cases, we submit, the rationale of this Court's decision in *Bianchi* requires the return of the case to the administrative board for determination of the unresolved factual issues.

To be sure, the majority opinion here notes the holdings by the Armed Services Board of Contract Appeals that it does not have jurisdiction to review the decisions of the Federal Housing Commissioner adjusting the bid price (R. 72) and it is also true that the administrative board (like the Court of Claims itself) will not review, or construe,

[10] Those rulings, we submit, directly contravene the express language of the contract providing for administrative resolution of the amount of equitable adjustments, and this Court's decision in *United States* v. *Callahan Walker Const. Co.*, 317 U.S. 56.

the wage determinations of the Secretary of Labor.[11] It might follow, as the government argued below, that the contractor's claim which disputes these decisions states no cause of action and should be dismissed as a matter of law—without a factual trial in any forum. But that was not the ruling of the Court of Claims. The whole court—majority and dissenting judges alike—thought the underlying factual issues should be resolved. One such question is whether the form of the project specifications, read "in light of the interpretation given such plans and specifications by custom and usage in the trade" (R. 68), reasonably led the contractor into the error of believing that the higher "building construction" wage rates set forth in the Secretary of Labor's initial determination applied to a narrower area of work than was intended. If so, the board might conclude—without in the least questioning the decision of the Federal Housing Commissioner or the Secretary of Labor's wage determination—that the contractor is entitled to a return of his deposit. There is no question of the board's jurisdiction to initially resolve that issue.[12] Nor is there any basis for

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[11] See, *United States* v. *Binghamton Construction Co.*, 347 U.S. 171; *Nello L. Teer Co.* v. *United States*, 348 F. 2d 533 (Ct. Cl.) petition for a writ of certiorari pending as No. 900, this Term.

[12] Also for the board's initial decision (in light of the Court of Claims' ruling that the question cannot be resolved as a matter of law) is the claim that the government was guilty of delays which "made it impossible for the builder to comply with the terms of the Letter of Acceptability" (see R. 83). Cf. *Carol D. Heers, et al.* v. *United States*, 165 Ct. Cl. 294.

supposing that it will decline to do so (see note 2 to the dissenting opinion below, R. 88–89).[13]

4. Finally, the majority opinion below invokes the policy against delay to support its conclusion, arguing that the need for expeditious handling of these cases will be served by judicial trial of the factual issues (R. 72–73). The same justification has been advanced with respect to the Court of Claims' practice of itself determining damages where the administrative board has been reversed on the liability issue. *Stein Bros. Mfg. Co.* v. *United States,* 337 F. 2d 861, 863–864. That reasoning, we submit, proceeds on two incorrect assumptions.

First, the court below too readily assumes that the *Bianchi* ruling here dictates a policy of speed at all cost (see R. 72). In truth, however, this Court's allusion to "delay at its worst" (373 U.S. 717), had reference to the "needless duplication of evidentiary hearings." The opinion in *Bianchi* does not suggest that the agreement of the parties to relegate fact determinations to agency decision be overridden whenever a faster judicial determination is available.

Second, there is, in fact, no reason to believe that the administrative trial of factual issues on remand will be any less expeditious than a judicial trial in the

[13] Indeed, the Board, while denying the contractor's initial appeal for untimeliness, expressly noted, with apparent approval, that "[t]he parties are in complete agreement that it was and is their mutual interpretation that in the event a timely appeal is taken thereunder the 'disputes paragraph' of the Letter of Acceptability confers jurisdiction on the Board to review a decision relating to cancellation of commitments, withholding of bid security, and itemization and determination of actual damages" (R. 36).

Court of Claims. On the contrary, available statistics indicate that the time necessary to hear and resolve factual issues before the boards is less than one-fourth that consumed in the Court of Claims.[14]

In sum, considerations of expeditious resolution of disputes do not support the decision of the Court of Claims. And, in any event, the agreement of the par-

[14] The average time between docketing and disposition of cases in the Armed Services Board of Contract Appeals is eleven months. Spector, *Is It "Bianchi's Ghost"—Or "Much Ado About Nothing"?* 29 Law and Contemp. Probs. 87, 99 (1964). We are informed that this figure includes cases disposed of by settlement after the appeal is taken. Statistics for all contract boards reveal that 20–25 percent of the cases are settled or withdrawn prior to hearing. Crowell and Anthony, *Practical Problems Facing Contractors' Counsel as a Result of Fragmentation of Remedies*, 18 Administrative Law Review 128, 139 (1965).

The Court of Claims does not keep statistics on the average time between the filing of complaints and disposition. However, a recent survey of that court's decisions for the period January 1, 1964 to July 16, 1965, showed an average disposition time of about 2½ years for motions, and 5½ years for decisions after trial. Crowell and Anthony, *op. cit. supra.*, at 139. Our own review of the Court of Claims' calendars for the year 1965 reveals that of the 34 arguments on the merits (*i.e.*, after findings by a commissioner) in government contract cases scheduled for that year, the complaints had been filed in the following years:

1965	None	1959	8
1964	None	1958	3
1963	None	1957	4
1962	1	1956	3
1961	7	1955	1
1960	7		

Thus, the average contract case took approximately six years between the time of docketing, and oral argument on the merits.

Similarly, a review of volumes 164, 165 and 166 of the Court of Claims Reports, covering the period January 1, 1964 to June 30, 1964, reveals that, in the 20 government contract cases in which opinions and orders were handed down, both on the

ties, and the rationale of this Court's decision in *Bianchi,* require administrative, rather than judicial resolution of the factual issues.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be reversed and the cause remanded to the Court of Claims with directions to stay its proceedings pending administrative determination of the factual issues.

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merits and on motion, the complaints were filed in the following years:

1963	2	1958	2
1962	4	1957	2
1961	1	1956	None
1960	4	1955	1
1959	4		

Thus the average case took approximately four years between docketing and opinion, and some of the motions decided did not dispose of the cases.

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